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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 235

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LINK-BELT COMPANY, A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This is in opposition to the petition for writ of certiorari to review the decree of the Circuit Court of Appeals (Seventh Circuit) affirming in part and modifying an order entered by the National Labor Relations Board (R. 1581-1582; 1519-1556).

The court below, in an opinion by Judge Kerner concurred in by Judge Major, held that there was no substantial evidence of company domination of the Independent so as to constitute it a dominated labor organization within the meaning of section 8 (2) of the Act, and refused enforcement of the order of disestablishment (R. 1565-1574). In this respect the decision of the lower court was unanimous, for Judge Treanor in a partially dissenting opinion held that while there was evidence of slight interference at the inception of the Independent, yet there was no substan-

tial evidence to support the Board's finding of domination and order of disestablishment (R. 1574-1580). Pursuant to an order entered by the court below on April 13, 1940, Link-Belt Company posted a cease and desist order forbidding interference of every kind contemplated under section 8 (1) of the Act (R. 1581-1583).[1]

---

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Link-Belt Company and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Lodge 1604 of Amalgamated Association of Iron, Steel and Tin Workers of North America, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees in any other manner discriminating in regard to their hire and tenure of employment or any terms or conditions of their employment;

(b) Either directly or indirectly, engaging in any manner of espionage or surveillance, or engaging the service of any agency or individuals for the purpose of espionage or surveillance, upon its employees or upon any labor organization of its employees;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Joseph E. Novak for any loss of pay he may have suffered by reason of the Link-Belt Company's discrimination in regard to his hire and tenure of employment, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge to the date of his reinstatement, less his net earnings, other than earnings as a musician, during said period; deducting, however, from the amount otherwise due to him, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects; and pay over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(b) Include Paul Bozurich, Harry Johnson, and Stanley Balcauski in the seniority list by classification which it maintains for all employees who were nondiscriminatorily laid off, and refrain from discriminating against Paul Bozurich, Harry Johnson, and Stanley Balcauski, when in accordance with its usual seniority rules, employment becomes available for any or all of them;

(c) Post immediately notices in conspicuous places throughout the 39th Street plant, stating: (1) that the Link-Belt Company will cease and desist as provided in paragraphs 1 (a), (b), and (c) of this Decree; (2) that the Link-Belt Company will take the affirmative action provided for in paragraph 2 (a) and (b) of this Decree;

(d) Maintain such notices for a period of at least sixty (60) consecutive days from the date of posting;

(e) Notify the Regional Director for the Thirteenth Region, in writing, within ten (10) days from the date of this Decree what steps the Link-Belt Company has taken to comply herewith.

This order drafted by the Board was not objected to by the Company.

The petition sets forth argumentatively the facts relied upon by the Board to support its order and seeks the review of this Court for the two following reasons:

1. The evidence of domination was substantial and the court below permitted itself too great a latitude of review (Pet. 8-25).

2. The decision of the court below creates a conflict with other circuits in the following respects:

(a) The replacement of the dominated representation plan by an inside successor organization without a substantial break in time or identity is evidence of domination (Pet. 25-27).

(b) The company was not responsible for the statements of supervisors because they had no authority to hire and fire (Pet. 28-30).

We contend that:

(1) There was no substantial evidence of domination when all of the evidence is considered; the court below followed the decisions of this Court and the Act; the court below neither ignored the findings of the Board nor substituted its own findings in lieu thereof, but accepted the findings of the Board and considered in conjunction therewith evidence which was overlooked by the Board which properly placed an entirly different aspect upon the issue of domination; and the evidence of vigorous collective bargaining between the Independent and the company taken in connection with all the other evidence left no substantial basis for the disestablishment of the Independent.

(2) There was no replacement of a dominated representation plan by an inside successor because the evidence found by the Board and accepted by the court below showed a complete dissolution of the representation plan followed by a substantial break in time before recognition of the Independent, which was a new labor organization in officers, leadership and legal structure; there was a total lack of evidence that the supervisors in question were acting on behalf of the company and the absence of any right to hire

and fire was not adopted as a rule of law but merely as another fact further demonstrating that these supervisors were not acting on behalf of the company. The decision of the court below on such evidence creates no conflicts in rules of law with other circuits, but demonstrates factual dissimilarity between the instant case and the cases in other circuits relied upon by petitioner.

I.

THE COURT BELOW NEITHER PASSED UPON THE CREDIBILITY OF WITNESSES NOR REJECTED THE SUBSIDIARY FINDINGS OF THE BOARD.

At no place in the opinion of the court below is the Board's judgment as to the credibility of witnesses altered. The court set forth the findings relied upon by the Board to sustain domination in the same order as set forth in the Board's decision.

The subsidiary findings of the Board from which it inferred domination of the Independent were accepted by the court below. Certain pertinent facts, overlooked by the Board, were considered in conjunction with the Board's subsidiary findings of fact.

Thus the Board found that a plan of representation, patterned to conform to the N.I.R.A., existed prior to recognition of the Independent, and that all plan representatives were active in the formation of the Independent and inferred therefrom the present domination of the Independent (R. 1524-1526; Pet. 12, 16). The court below did not disturb these findings of the Board but pointed out that the leader and chief organizer of the Independent, Linde, was never a representative of the representation plan (R. 1568, 713), that the officers of the Independent were not representatives of the plan (R. 1569, 737), and that Salmons and Lackhouse, leaders of the Amalgamated (the

competing labor organization), were both representatives of the plan (R. 1567-1570, 146, 305).

In the light of this uncontracted evidence, the court below rejected the inference of present domination of the Independent from the existence of the representation plan and the fact that certain plan representatives joined the Independent. That these men were natural plant leaders is more reasonable than that they were acting on behalf of the company.[2]

The Board found that the Independent presented proof of membership along with a recognition agreement to the plant manager on April 19, 1938; that the plant manager refused to sign the agreement without permission of the president; that after conferences with the president the recognition agreement was signed on April 21; and from this the Board concluded that the Independent was dominated (R. 1527-1528; Pet. 15, 21). The court below did not disturb these findings of fact but pointed out in addition thereto that the proof of the Independent's majority consisted of 760 signatures out of 1,000 eligible workers; that the plant manager examined for genuineness the membership cards in addition to the petitions submitted; and up to the time of recognition of the Independent there had been no demand for recognition by the Amalgamated (R. 1568, 1146).

In view of these undisputed facts, there could be no inference of domination from alleged hasty recognition. Any other course might have subjected the company to a charge of an unfair labor practice.

The Board sets forth that after petitions of the Independent were hectographed on a company machine (R. 1527; Pet. 13, 18), the Independent's organizers engaged in open and extensive solicitation throughout the plant

2. *New York Central R. Co. v. Ambrose*, 280 U. S. 486.

during working hours and the Board inferred that the members of the supervisory staff were aware of the campaign (Pet. 14). It concluded from such solicitation that the Independent was dominated. The court below did not disturb such findings but pointed out that the majority of signatures were obtained outside working hours (R. 1568) (a parallel finding was made in the Board's decision, R. 1533) and that the record showed that both the Amalgamated and the Independent engaged in union activities on company time (R. 1569).[3] This was acknowledged by the Board's Trail Examiner, who stated: "I think the record is pretty clear that it worked both ways." (R. 901, 1569.) The inference of domination disappears when no showing can be made that one competing union was treated differently from the other.[4] The record is replete with evidence of warnings given to both the Independent and the Amalgamated for soliciting during working hours.[5] The Board made no finding that the company had knowledge of the use of its hectograph machine and the undisputed evidence shows that the company neither authorized nor had knowledge of such use (R. 1041-1042).

The Board sets forth certain statements by minor supervisory employees at the beginning of organizational activity from which it inferred domination (Pet. 14-15, 19-20). The court below did not disturb these findings but pointed

3. Solicitation or collection of dues by the Amalgamated on company time: Szabo, R. 917; Nordine, R. 918; Johnston, R. 921; Workman, R. 900; Kubicki, R. 904; Sterling, R. 889; Lubenkov, R. 910; Speiser, R. 913; DeRuntz, R. 894; Smith, R. 895; Kovatch, R. 862; Froling, R. 822, 826, 827; Wright, R. 1060; Bailey, R. 881; Sullivan, R. 880; Salmons, R. 208.
Solicitation or collection of dues by the Independent on company time: Balcauski, R. 658, 660; Thomas, R. 540; Lackhouse, R. 529; Bozurich, R. 425, 426, 427; Kachka, R. 362; Thomas, R. 355; White, R. 348, 349; Sullivan, R. 344, 345, 346; F. Johnson, R. 314; F. Lackhouse, R. 282, 286, 287; Novak, R. 222, 224.

4. *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board*, 98 F. (2d) 758, 761 (C. C. A. 2); *Cupples Company Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100, 108 (C. C. A. 8).

5. Warnings to Independent organizers: R. 829, 830, 816, 822, 800, 803, 701, 760, 781, 872.
Warnings to Amalgamated organizers: R. 317, 325, 334, 662.

out that some of the statements of such employees were non-coercive conversational remarks (R. 1571), that there was no showing that such minor supervisory employees had authority to speak on union matters nor that they were acting on behalf of the company. There was evidence that the men were not impressed by any such statements (R. 183, 282, 178). The statements were not a substantial basis for an inference of domination.

Finally the Board found that Salmons, leader of the Amalgamated, was discharged in September, 1936, for engaging in union activities (R. 1537-1540; Pet. 12, 16). The court did not disturb this finding but pointed out that Salmons' union activity admittedly took place on company time and that Salmons was rehired in December, 1936, after mediation by the Regional Director (Thirteenth Region) of the National Labor Relations Board upon the express understanding that he would not solicit and interfere with other employees on company time (R. 1569, 1570, 191). Salmons testified, as the court below pointed out, that he believed the Act gave him the right to organize on company time (R. 1569, 169). There was credible evidence that Salmons carried this mistaken belief to the point where he stopped the operation of a machine to solicit the operator (R. 1131-1132). Plant discipline required his discharge and the Trial Examiner so found (R. 1481). In view of this evidence, the discharging and rehiring of Salmons in 1936 could not support an inference of domination of the Independent in 1938.

The Court Below Engaged in Permissible Review of the Board's Order.

The court below neither passed upon the credibility of witnesses nor did it reject the subsidiary findings of the Board. As the order of disestablishment was not based

upon direct and positive evidence of domination but rather upon inference, the lower court was justified in passing upon the reasonableness of these inferences. It has been demonstrated above that the Board's findings of fact were accepted by the lower court—viz., there was a representation plan; the leaders of the representation plan were active in the formation of the Independent; recognition of the Independent came two days after the demand; the Independent engaged in soliciting on company time; certain supervisory employees made statements at the beginning of organizational activity; and Salmons was discharged in September, 1936 for union activity and was rehired in December, 1936.

The probative force of these facts found by the Board was altered by undisputed evidence overlooked by the Board—viz., the chief organizer of the Independent was Linde, who was never a representative of the representation plan; the officers of the Independent were not representatives of the plan while the two main leaders of the Amalgamated were representatives of the plan; the Independent's proof of majority consisted of 760 signatures out of 1,000 eligible employees; the plant manager examined for genuineness the membership cards and petitions; up to the time the Independent was recognized there had been no demand for recognition by the Amalgamated; both the Amalgamated and the Independent engaged in union activities on company time; the statements of minor supervisory employees were non-coercive conversational remarks; there was no showing that such supervisors had authority to speak on union matters nor that they were acting on behalf of the company; Salmons admitted engaging in union activity on company time and believed he had that right under the Act; Salmons was rehired in December, 1936, four months after he was discharged as a result of mediation by an agent of

the Board upon the express understanding that he would not solicit and interfere with other employees on company time.

Assuming only for the sake of argument that a legitimate inference of domination could be supported by the facts as found and considered by the Board, the presence of this other evidence destroyed the probative value of the facts relied upon.

With the bases upon which the Board relied for inferring domination thus weakened by the presence of facts not theretofore considered, the lower court properly accepted evidence of the inherent strength of the Independent, in its organization and in its bargaining with the company, as destroying the inference of domination. Circuit courts of appeals are not denied the right by statute or mandate of this Court to examine such other facts. *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, (U. S. Supreme Court) decided May 20, 1940; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

The Independent is an association incorporated under the laws of Illinois (R. 1448) and has two separate local unions (R. 728, 749). It has a constitution and by-laws, elects officers and shop stewards (R. 1444, 1314). It collects dues of fifty cents per month (R. 749) and at the time of the hearing had $3,000 in its bank account (R. 749, 850, 854). It hired an attorney to defend its independent status before the Board and through the courts (R. 749, 779). It had an agreement with the company on wages, hours and working conditions (R. 742-743, 1460) and had engaged over a long period of time in active collective bargaining which resulted in many concessions by the company. Up to the date of the hearing this bar-

gaining produced a five per cent bonus for all hourly pai employees in 1937 (R. 741) and a five per cent additiona bonus for all night workers (R. 744), vacation pay for me laid off in 1938 (R. 746), changes in the vacation pla (R. 745, 1467), changes in the seniority policy (R. 1466 and improved working conditions. The record shows 2 separate and distinct collective bargaining conference between representatives of the company and the Inde pendent up to the time of the hearing (R. 740-746). Thi does not include the great number of grievances settled b shop stewards and foremen (R. 747).

This direct, proximate and positive evidence of "n domination" destroyed the weak and illogical inference upon which a conclusion of "domination" was based The court below, in both majority and dissenting opin ions, could only hold that the order of disestablishmen of the Independent lacked substantial support in the evi dence.

II.

THE DECISION OF THE LOWER COURT DOES NOT CREATE A CONFLICT WITH OTHER CIRCUITS.

The Board argues that a conflict exists, first, becaus the court below did not accept as support for the Board' finding of domination the evidence that the Independent was formed and established while the representation plan existed and that the employee representatives under the plan were active in forming the Independent, (Pet. 25-27) and second, because the court below adopted the "hire and fire" test in holding that the company was not re sponsible for the activities of certain supervisors (Pet. 28-30).

The court below carefully considered the evidence of a "successor" organization and, after considering all of

the evidence, held that the fact that the plan preceded the Independent was not substantial evidence of domination (R. 1567-1568, 1570).

Likewise, the petitioner is plainly mistaken in contending that the court below adopted a "hire and fire" test for the purpose of holding that the company was not responsible for the activities of certain supervisors. The court below made no statement or holding that the power to hire and fire is a necessary prerequisite to the conclusion that the company is responsible for the statements of supervisory employees. The court below considered the activity of certain supervisory employees, found that there was no evidence to connect the company with their activity, and as one of the considerations stated that they had no right to hire and fire (R. 1571).

The petitioner urges that courts of appeals have laid down rules of law that whenever an independent "succeeds" an employee representation plan, the independent is dominated as a matter of law, and also whenever there is union activity by supervisory employees, the independent union is dominated. The fallacy is that the conflicts urged by the Board are not conflicts of law but are merely different results due to factual variations in each particular case. It is a conflict in legal principles, not factual differences, that is contemplated by this Court as a ground for granting certiorari.[6] The cases cited by petitioner do not show conflicts in legal principles but demonstrate the factual dissimilarity between those cases and the case at bar.

6. *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 208; *United States* v. *Johnson*, 268 U. S. 220, 227.

THE "SUCCESSOR" ORGANIZATION CASES CITED BY PETITIONER ARE NOT INCONSISTENT WITH THE CASE AT BAR.

The Board discussed *Westinghouse Electric and Mfg. Co.* v. *National Labor Relations Board,* decided June 10, 1940 (C. C. A. 2), and *Kansas City Power and Light Co.* v. *National Labor Relations Board,* 111 F. (2d) 340 (C. C. A. 8), as cases holding that where an independent follows a representation plan in close temporal sequence, then the independent is dominated (Pet. 25-27). In both of these cases, as contrasted with the case at bar, there was positive evidence to link the representation plan to the independent and also to link the activities of the representatives who were active on behalf of the independent to the company.

In *Westinghouse Electric and Mfg. Co.* v. *National Labor Relations Board,* decided June 10, 1940 (C. C. A. 2) the independent was organized and its constitution planned at the last meeting of the representation plan. Thus there was no break between the representation plan and the independent. There was a complete absence of any evidence in that case that the independent engaged in active and successful bargaining, that the independent had its own attorney, collected dues or had substantial funds. Such evidence we have pointed out was present in the case at bar and is strong uncontradicted evidence to rebut any inference of domination (Brief, 9-10).

In *Kansas City Power and Light Co.* v. *National Labor Relations Board,* 111 F. (2d) 340 (C. C. A. 8) the Circuit Court of Appeals properly pointed out that there was no hiatus between the representation plan and the independent. There the constitution of the independent provided that the representation plan was to remain in existence until the constitution was adopted by the independent and the counselmen under the representation

plan were to continue to serve as committeemen under the independent.

Petitioner does not contend that there is any organizational defect in the case at bar such as was present in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, and *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Company*, 308 U. S. 241. In the case at bar the Company did not have any organizational control of the Independent Union, and for this reason petitioner could not assert that the case at bar is in conflict with any decisions of this Court.

In addition to *Westinghouse Electric and Mfg. Co.* v. *National Labor Relations Board*, decided June 10, 1940 (C. C. A. 2) and *Kansas City Power and Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340 (C. C. A. 8) petitioner also cites as inconsistent with the decision below other Circuit Courts of Appeals cases that hold the activity of former representatives on behalf of an independent union was support for the finding that section 8 (2) was violated (Pet. 27, n. 14). In the case at bar there is no evidence to connect the company with the former plan representatives and therefore with the Independent, but in each one of the cases cited by the petitioner there was positive evidence connecting the company with the plan representatives and the independent which standing alone was substantial evidence of domination. The positive evidence present in these cases supplies the evidentiary link to connect the company with the activities of the former plan representatives.

In *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2); *Republic Steel Corporation* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3) cert. granted May 20, 1940; *National Labor Relations Board* v. *Greenebaum Tanning Co.*, 110 F. (2d) 984 (C. C. A. 7); *Swift & Co.* v. *National Labor Rela-*

tions Board, 106 F. (2d) 87 (C. C. A. 10) (Union paid one dollar for use of the company cafeteria); *National Labor Relations Board* v. *Brown Paper Mill Co.,* 108 F. (2d) 867 (C. C. A. 5) cert. denied June 3, 1940; *Texas Company* v. *National Labor Relations Board,* (C. C. A. 5), decided June 19, 1940 independent union meetings were held on company time and property or on company property rent free, but in the case at bar the Independent enjoyed no such privileges.

In *National Labor Relations Board* v. *American Manufacturing Co.,* 106 F. (2d) 61 (C. C. A. 2); *International Association of Machinists* v. *National Labor Relations Board,* 110 F. (2d) 29 (C. C. A. D. C.), cert. granted April 1, 1940; *National Labor Relations Board* v. *Greenebaum Tanning Co.,* 110 F. (2d) 984 (C. C. A. 7); *Continental Oil Co.* v. *National Labor Relations Board* (C. C. A. 10), decided June 14, 1940; *National Labor Relations Board* v. *Brown Paper Mill Co.,* 108 F. (2d) 867 (C. C. A. 5), cert. denied June 3, 1940, the company recognized the independent union without making any check of the union's majority, but in the case at bar the company carefully checked the signatures (R. 1145).

In *Union Drawn Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 587 (C. C. A. 3), the company hired the principal organizer of the independent union for the express purpose of organizing an independent, but in the case at bar the Independent was initiated by Linde and other regular employees and without any suggestions or encouragement from the company (R. 714-715).

Even without considering the positive evidence connecting the company with the former representatives that is present in all of these cases cited by petitioner, the inference of domination from the activity of the representatives might be justified under the circumstances in these cases. In cases cited by petitioner the former representa-

tives were the real leaders of the independent movement. In the case at bar the former representatives merely joined the Independent movement, and the real leader and organizer of the Independent was Linde, who never served as a representative under the representation plan. In the case at bar none of the officers of the Independent were former representatives. (R. 737).

Petitioner's "Hire and Fire" Cases Are Consistent With the Case at Bar.

We have pointed out that the court below did not adopt the alleged "hire and fire" test or any other legal test to determine whether the company was responsible for the activities of certain supervisors (Brief, 11). Petitioner cites cases where the Court found the employer was bound by the acts of certain supervisory employees who did not have the right to hire and fire as inconsistent and in conflict with the holding of the court below (Pet. 28-30). The cases cited by petitioner held that the right to hire and fire is merely one of the facts to be considered in the determination of whether or not the company is responsible for the union activity of certain employees. Where the courts of appeals have held the company responsible for the acts of minor supervisory employees they have always found evidences to link their union activity to the company.

The first case cited as in conflict with the decision of the court below on the alleged "hire and fire" test is *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2). In that case certain supervisory employees had the following history of union activity: they organized a dominated union in 1936 formed to break a strike; following the strike they solicited the employees to join the company union; they distributed on behalf of the company cards printed by the company asking

employees to repudiate the C.I.O. union; they formed an "independent" union, held independent organizational meetings on company property and the plant was shut down for that purpose. The Second Circuit Court of Appeals properly held that this evidence supplied the connection between the company and the activities of the minor supervisory employees. No such connecting evidence is present in the case at bar. In addition, that court pointed out that there was no collective bargaining by the independent and as we have shown the converse is true in this case (Brief, 9-10).

The next case cited by the Board is *Virginia Ferry Corporation* v. *National Labor Relations Board,* 101 F. (2d) 103 (C. C. A. 3), where the company was held responsible for the statements of a boat captain. As was aptly pointed out in *Cupples Company Manufacturers* v. *National Labor Relations Board,* 106 F. (2d) 100 (C. C. A. 8) the position of a boat captain is not comparable to a minor supervisory employee in a manufacturing plant.

The Board finally cites the case of *International Association of Machinists* v. *National Labor Relations Board,* 110 F. (2d) 29 (C. C. A. D. C.), cert. granted, April 1, 1940, which is in perfect accord with the court below, because it holds that the question of the company's responsibility is a question of fact:

> "What is required is that *substantial evidence* show that the actor, whatever his official position, is acting *in fact* on behalf of the employer, not for himself or *others* only, * * *." (Italics added.)

The Board then states that the decision of the Court of Appeals conflicts with other cases not specifically discussing the alleged "hire and fire" test. (Pet. 29-30.) None of the cases cited are contrary to the position taken by the court below that the power to hire and fire is merely evidence of an employee's authority.

In *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4), where the union was held not dominated, the court said, considering the company's responsibility for the statements of a supervisor:

> "* * * there was substantial evidence to show that the superintendent of the press room, who had control of the men in that department with authority to hire and discharge them, made a number of statements from which the men might fairly infer that it was not to their interest to become members of the Union and that they might suffer from such an association."

H. J. Heinz Co. v. *National Labor Relations Board*, 110 F. (2d) 843 (C. C. A. 6), cert. granted June 3, 1940, is easily distinguished. During a strike the company sent a copy of its agreement with the independent union to all of its employees accompanied by a communication which, after stating that the plant could not immediately be reopened because of the strike, said:

> "We believe that the support of the members of of the Heinz employees association will be an important factor in securing free access to our property."

Such a communication is proof of the company's position with respect to the union affiliations of its employees. No such positive evidence of domination is present in the case at bar.

In *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9), the C.I.O. union claimed a majority and demanded recognition and bargaining rights but the company steadfastly refused to recognize or to bargain with that union. The independent union was initiated by the circulation of petitions followed by an election. For the purpose of adopting the petitions a group of employees, with the permission of the company's manager, met in an office furnished by the company. The company made the voting booths for the election and during the election the company's general foreman and time-

keeper were present. The illegal activities of that company were explained by the company's insistence that it was not subject to the National Labor Relations Act. No such positive evidence of domination is present in the case at bar.

In the case of *Swift & Co.* v. *National Labor Relations Board,* 106 F. (2d) 87 (C. C. A. 10) there was evidence of numerous instances where foremen threatened employees with discharge unless they dropped out of the C.I.O. and joined the independent union. There was evidence that these threats were effective. At the last meeting of the representation plan the company's plant superintendent read a statement suggesting to the representatives that they continue the representation plan as an independent union. The representatives remained in the assembly room and acting on the suggestion of the plant superintendent decided unanimously to form an independent union. The following morning they held a second meeting in the plant cafeteria which the company rented to them for the nominal fee of $1.00. Prior to the company's acceptance of the independent union as sole bargaining agency the C.I.O. had made two futile demands for sole collective bargaining rights. None of the foregoing evidence of domination is present in the case at bar.

Finally, the Board cites *Titan Metal Manufacturing Co.* v. *National Labor Relations Board,* 106 F. (2d) 254 (C. C. A. 3), cert. denied, 308 U. S. 615, where the president of that company wrote a letter to his employees expressing his antagonism to an affiliated union in no uncertain terms. When the president of the company was presented with a recognition agreement he told the committee that he would not operate a plant affiliated with the A. F. of L. or any other union. He wrote letters to his employees threatening to move his plant. The independent union was formed as a joint venture with the installation of a group insurance

plan, at a meeting called for the dual purpose of selling the group insurance, and initiating the independent. No such evidence of domination is present in the case at bar.

The Board states in a footnote (Pet. 30 n. 16) that the decision of the court below is inconsistent with *National Labor Relations Board* v. *Wallace Mfg. Co.*, 95 F. (2d) 818 (C. C. A. 4) and *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. (2d) 745 (C. C. A. 8) cert. denied 308 U. S. 565, for the reason that the court below did not hold that the mere attendance of a foreman at an independent union meeting was evidence of interference. The court below did consider this evidence but properly held that in the case at bar there was no evidence of interference from the mere presence of the foreman at the meeting.

In *National Labor Relations Board* v. *Wallace Mfg. Co.*, 95 F. (2d) 818 (C. C. A. 4) the company gave the independent union the right to use its buildings for its meetings, although this privilege was denied the outside union. Employees were told that their jobs depended upon their joining the independent. Seventeen members of the outside union were discharged, and two of these were reemployed upon joining the independent and giving up their outside union membership. The court also pointed out that during the whole course of the independent's existence it never functioned as a bargaining agency.

In *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. (2d) 745 (C. C. A. 8) cert. denied 308 U. S. 565, the independent organizers engaged a company attorney. The plant manager rented a hotel room for the independent organizers and attended the first two organizational meetings for the purpose of alleviating any fears the employees might have about joining the independent.

In the cases cited by petitioner there was evidence directly connecting the company with the Independent, whereas in the case at bar there is no evidence of the com-

pany's interference. Petitioner's cases are not in conflict with the case at bar because they do not hold that the mere presence of a foreman at an independent union meeting is substantial evidence of domination. *National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. (2d) 872, 875 (C. C. A. 3).

Accordingly, the twenty cases relied upon by the Board to establish conflicts among circuits in the above respects are insufficient for that purpose. They show differences in facts which necessarily altered the decision and, as we have shown, do not establish conflicting rules of law.

Conclusion.

For the reasons above stated we respectfully suggest that the petition for writ of certiorari be denied.

Respectfully submitted,

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